No 70-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 989~~

SIERRA CLUB, a California corporation,

Petitioner,

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

and

BRIEF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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IN THE

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OCTOBER TERM, 1970.

No. 939.

SIERRA CLUB, a California corporation,

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, IN SUPPORT OF RESPONDENTS.

TO THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 42 of the Rules of this Court American National Cattlemen's Association, Idaho Public Lands Resources Council, National Forest Products Association, National Water Resources Association, Oregon Field Trial

Council, Outdoors Unlimited, Inc., and Public Resources Council of Oregon, respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the respondents herein. Respondents have consented to the filing of that brief. Petitioner has not.

The Interest of the Movants.

The movants are organizations and associations which have as their members users of national forests and parks (public lands), as well as persons vitally concerned not only with the conservation, but also the proper multiple utilization, of the vast natural resources contained on and constituting the public lands of the United States. Their members include those interested in each of the multiple uses of the national forests within the Congressionally stated national policies for the occupancy and use of such forests, *i.e.*, outdoor recreation, range, timber, watershed and wildlife and fish purposes, as well as in securing favorable conditions of waterflows and in furnishing a continuous supply of timber for the use and necessities of citizens of the United States, and in the Congressionally mandated uses of national parks.

Each movant is concerned with the issue of the standing of the petitioner to contest administrative decisions of the Secretaries of Agriculture and Interior over the use of national forests and parks. Although each movant may, in a particular situation, abstractly wish to contest a decision of the respondents charged with administration of the occupancy and use of public lands, as does the petitioner here, the movants are of the view that for the sake of orderly administrative procedures and of the interests of all those concerned with the multiple uses of public lands,

such agency decisions should be challengeable in the federal courts only by persons or organizations who have or will suffer injury in fact from such decisions and who shall have first exhausted such administrative remedy or remedies as may be available, and not by self-appointed agents of such persons or organizations.

Movants, who are as vitally interested as the petitioner in conservation aspects of the administration of public lands, also represent a broad cross section of the heterogeneous multiple users of such lands, who will be directly affected by this Court's resolution of the issue of standing.

The Reasons for a Brief Amici Curiae.

The court below held that the petitioner's asserted general interest in conservation matters was abstract and hence insufficient to support the litigation. *Sierra Club* v. *Hickel,* 433 F. 2d 24, 30 (9th Cir. 1970). Each movant is equally concerned with the issue of the standing of a petitioner with such an asserted general or abstract interest to contest administrative decisions of the Secretaries of Agriculture and Interior over the occupancy and use of public lands, because the standing of one class of users, i.e., conservationists, can or may directly affect adversely the other multiple users of such public lands.

The movants, as broadly representative associations of multiple users of public lands of the United States, seek leave to file a brief *amici curiae* in order to bring to the attention of the Court the probable effects of a reversal of the decision below on the standing issue upon the Congressionally ordained multiple use and other policies governing occupancy and use of national forests and national parks.

WHEREFORE, the movants respectfully request leave to file and serve a brief *amici curiae* in the form attached to this motion in support of the affirmance of the order of the court below.

Respectfully submitted,

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Dated, Chicago, Illinois
July 8, 1971.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 939.

SIERRA CLUB, a California corporation,

Petitioner,

vs.

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BRIEF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* are organizations and associations which have as their members users of national forests and parks (public lands), as well as persons vitally concerned not only with the conservation, but also with proper multiple

utilization, of the vast natural resources contained on and constituting the public lands of the United States. Their members include those interested in each of the multiple uses of the national forests within the Congressionally stated national policies for the occupancy and use of such forests, *i.e.*, outdoor recreation, range, timber, water shed and wildlife and fish purposes, as well as in securing favorable conditions of waterflows and in furnishing a continuous supply of timber for the use and necessities of citizens of the United States, and in the Congressionally mandated uses of national parks.

The public lands of the United States, typified by the national forest and park involved in this litigation, constitute vast federally owned and controlled natural resources, the use and occupancy of which affects the lives and well being of nearly all citizens of the United States. Inventories of standing timber, for example, the raw material for conversion into the nation's needed forest products, are heavily concentrated in such federal ownership, to the extent that Congressional Committees and the United States Forest Service acknowledge a government monopoly position in selling softwood timber.[1] Those same public lands afford millions of acres for range uses, and are the source and, indeed, the head waters of much of the nation's water resources. Collectively, such public lands constitute a vast natural resource for outdoor recreation and the conservation of wildlife and fish. The administration of the occupancy and use of such federally owned natural resources by the Secretaries of Agriculture and Interior, i.e., the means by which the general public can utilize those

1. See Senate Report No. 1118, on The Impact of Increasing Log Exports on the Economy of the Pacific Northwest, 90th Cong., 2d Sess., pp. 8-9 (1968); Hearings before the Subcommittee on the Department of the Interior & Related Agencies of the House Committee on Appropriations, 88th Cong., 1st. Sess., p. 1343 (1963).

unique resources, therefore directly or indirectly affects nearly all citizens of the United States. Accordingly, standing to sue in the federal courts to intercept such administration by one class of users directly affects the vital interests of all or most other users.

Each *amicus curiae* is concerned with the issue of the standing of the petitioner to contest administrative decisions of the Secretaries of Agriculture and Interior over the use of national forests and parks. Each is of the view that for the sake of orderly administrative procedures and of the interests of all those concerned with the multiple uses of public lands, such agency decisions should be challengeable in the federal courts only by persons or organizations who have or will suffer injury in fact from such decisions and who shall have first exhausted such administrative remedy or remedies as may be available, and not by self-appointed agents of such persons or organizations with, at most, a subjective concern for conservation.

The *amici curiae,* who are as interested as the petitioner in the conservation aspects of the administration of public lands, also represent a broad cross section of the heterogeneous multiple users of such lands, who will be directly affected by this Court's resolution of the issue of standing.

THE QUESTION PRESENTED.

Whether the Sierra Club, a national conservation organization, has standing to challenge a decision by the Secretaries of Agriculture and Interior to develop the Mineral King Valley in California for public recreation and the concomitant decisions to accomplish that development through private contractors and permittees.

STATEMENT OF THE CASE.

The *amici curiae* adopt as their statement of the case the statement contained in the Brief for Respondents.

SUMMARY OF ARGUMENT.

Petitioner should not be permitted to sue solely on the basis of its professed concern for the conservation of the Sierra Nevada Mountains.

To open carefully made administrative decisions to judicial review by persons or organizations who in fact can allege no injury dissipates, if not destroys, the essential advantages of the administrative process, *i.e.*, decisions made expeditiously, uniformly, with expertise and with finality. The economic well-being of a large region of the nation is dependent upon such administrative decisions respecting use of public lands. To permit the abstract interests of the uninjured petitioner, time after time, to delay and threaten decisions as to the use of public land works an unjustified hardship on vast numbers of persons and communities whose vital interests are dependent on orderly and uninterrupted use of such lands. Such hardship is also borne by the judiciary.

Petitioner cannot properly claim injury done to its members as a basis for its standing. Petitioner has shown no needed exception to this fundamental principle. To find otherwise would be to disregard the availability of class actions and the application of *res judicata* to class members. Here, though petitioner purports to represent its members' interests, in fact such members would not be bound by an adverse decision and would be free to relitigate.

Standing based on injury in fact is a sound rule, because it is simply applied, objective, and will not lead to injustice

to persons claiming harm. To resort to naked concern for conservation as a basis for standing, the result if petitioner is held to have standing here, would be an undesirable substitution of a subjective rule that would be virtually impossible of application by the federal courts.

Statutes cited by petitioner do not indicate that uninjured persons or organizations possessing at most an abstract concern are intended to be protected or given any statutory right to sue.

ARGUMENT.

I. Standing Gained Upon Petitioner's Naked Assertion of Concern for Conservation of Natural Resources Can Destroy the Administrative Process and Work Hardship on Users of Public Lands.

In essence, petitioner claims a right to sue solely on the basis of a professed concern for the conservation of national parks, game refuges and forests, particularly with respect to the Sierra Nevada Mountains. Petitioner fails to allege any injury either to itself as a corporation or to any of its members.[2] Petitioner thus seeks to test the proposition whether a naked assertion of concern for conservation of natural resources will, alone, accord standing.

This Court, however, has adhered to the fundamental principle that a plaintiff has standing to sue in the federal courts only (a) when it has alleged that the challenged action has caused it "injury in fact," economic or otherwise, and (b) when the injured plaintiff is arguably within a statutorily or constitutionally protected "zone of interest." *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150, 152, 153 (1970); *Barlow* v. *Collins,* 397 U. S. 159, 164 (1970); and *Investment Company Institute* v. *Camp,* 39 U. S. L. Week 4406, 4407 (U. S. April 5, 1971).

The present proceeding demonstrates several sound reasons for adherence to those standing criteria:

Litigation such as this is a burden not only for parties but also for non-parties affected by the issues here in contention, irrespective of the eventual outcome on the

2. Complaint, para. 3, referred to in Judge Sweigert's opinion, A. 4, 197.

merits. Where such litigation follows an extended administrative process involving a nationally owned and controlled natural resource and affects a wide range of economic and non-economic interests of both parties and non-parties, the burdens, delays and uncertainties arising from the litigation are particularly pronounced.

A party who has suffered a real and not an abstract injury by reason of administrative decisions should have recourse to the courts to test issues appropriate for review. The Administrative Procedure Act contemplates such review by persons who are "adversely affected" or "aggrieved" by agency action within the meaning of the relevant statutes. 5 U. S. C. § 702.

However, to permit a party who has not suffered a personal injury to use the federal courts to dissect administrative decisions of the Secretaries of Agriculture and Interior and to interpose the delays and burdens of litigation on the affected parties and the multiple users of such a natural resource is a result not founded upon precedent, is destructive of the administrative process, and is grossly unfair to those directly and indirectly affected thereby.

Administrative procedures, such as those here involved, are established to facilitate the making of decisions fairly, expeditiously, uniformly and with expertise. With respect to the administration of the occupancy and use of the public lands of the United States the need for such goals is particularly appropriate. Congress has mandated the Secretaries of Agriculture and Interior to administer and manage the national forests and parks to ensure utilization in numerous ways that will best meet the needs of the American people. Conservation Code, 16 U. S. C. § 1 et seq. That includes the interests of various multiple users of public lands, as well as those solely interested in conservation of such resources. 16 U. S. C. §§ 475-479, 481-497, 502, 529, 531-538.

Uniformity of decision, consistent with Congressional policy, evolved and adopted by those agencies charged with the administration of public lands is essential. Decisions as to use of such lands may in some cases be virtually irreversible and, thus, must be made with care and by administrators with professional expertise who are familiar with the applicable facts and who possess an understanding of the basic principles governing multiple land use. The economic well being of entire states and regions in this nation are dependent upon certain use of public lands. Economies which are undergirded by use of public land, such as those engaged, for example, in conversion of timber or in cattle grazing, cannot, realistically, have each administrative decision as to land management or use threatened by the substantial delays and uncertainties incident to judicial review. While the public land management decision-making process must be thorough and consideration be given to all relevant factors, such decisions must be reasonably prompt and finality achieved. The administrative agency, generally, is better equipped than the judiciary to accomplish such a result because of its expertise, intimate knowledge of the subject matter, and continuing statutory responsibilities.

These essential advantages of the administrative process can be dissipated, if not destroyed, by unlicensed judicial review by persons or organizations who, though not injured in fact by such decisions, wish to see them tested in the courts. Such an opening of judicial review to any and all parties motivated to see each administrative decision not to their liking judicially tested would effectively shift the decision-making process from the forum of the administrative agency to that of the courtroom.

The price to be paid for such a change of forum includes the problem of diversity of decisions from court to court, caused not only by varying views of the law but also by

varying degrees of expertise. A visible immediate result of such a change would be an increased frequency of delays in the reaching of final decisions on the occupancy and use of public lands and the resources contained thereon. Even where preliminary injunctions are not granted, the fact that administrative decisions are undergoing review and may be reversed, as a practical matter, causes parties as well as non-parties to postpone commitments they would otherwise make. That added hardship of such litigation may, on balance, be acceptable where the complainant claims actual injury. But where judicial review is the result solely of a dedication to abstract principles by a complainant who insists on its right (standing) to test in court each administrative decision not to its liking, the burdens to the agencies and other multiple users of the national natural resource of such review clearly outweigh the advantages to the claimant.

The argument that petitioner does not attempt to represent all interests of the public and that if other groups are affected by the administrative decisions, they too should join in the judicial review is untenable. (Brief for Petitioner, at 28) Joining in judicial review is no answer to many multiple users of public lands to whom time is of the essence, who, by reason of their commitments and the vital interests of employees and communities dependent on their continued operations, must accept present decisions, whether favorable or unfavorable, respecting public land use and occupancy. A timber convertor denied access to timber sales by the Forest Service often, of necessity, must shut down rather than litigate with the timber management agency. An agency decision favorable to that timber convertor, which may permit it to purchase and remove timber, that is judicially reviewed by the petitioner because of its general disagreement with the administrative decision, may, in effect, be just as unfavorable to the timber

convertor and to the employees and communities, and the schools (financed by timber receipts) dependent upon him. The result of what, in effect, is an informal preliminary injunction thus inexpensively obtained by petitioner can destroy the vital interests of communities, schools—indeed of entire states—which are based upon uninterrupted use of public lands, even if the agency decision, in fact, would ultimately be affirmed on the merits.

Thus, a party who opposes in the federal courts an administrative decision, though not injured by it, may effectively reverse that decision by simply imposing the delays of litigation. The federal courts should not be so used to block, at relatively little expense or responsibility to the litigant, carefully made administrative decisions which affect the livelihood and well being of substantial numbers of persons, when no injury is alleged.

Administrative procedures are available for concerned groups, such as petitioner, to voice their objections to certain administrative decisions. Such procedures should be first exhausted before judicial intervention is permitted. See, *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 116, 117 (D. Alaska 1971).[3] Only then should the courts concede standing for complainants who at least allege that they have been

3. The District Court, speaking through Plummer, C. J., stated:

"... The Sierra Club is acquainted with Forest Service protest and administrative review procedures, having previously employed them in cases similar to the one at bar. No satisfactory explanation has been offered for the plaintiffs' failure to file an administrative protest prior to instituting this action on February 10, 1970.

• • • • •

"Plaintiffs have completely ignored established administrative procedures which could have obviated the need for review by this court, or which in the alternative could have provided a meaningful record that would have vastly simplified this proceeding. Their claims, with the exception of the cause of action based upon violations of the National Environmental Policy Act of 1969, are accordingly barred." 325 F. Supp. at 116, 117.

injured. In the present litigation there is no indication that petitioner sought to have the decisions modified administratively.[4]

Judicial review of technical administrative decisions is at best an arduous task.[5] Unrestricted access to the courts by those persons who have not followed available administrative procedures and who do not allege that they in fact have been injured by agency decisions imposes material hardship unnecessarily upon the judiciary.

II. Petitioner Cannot Gain Standing by Asserting Justiciable Rights of Its Members.

Petitioner claims standing to represent the "interests" of its members (Brief for Petitioner at 26-29), yet fails to allege that such interests of its members are any less abstract than its own. It fails to allege, for example, that any of its members is actually a user of the Mineral King Valley who will be denied such use as a result of the Disney project.

But, beyond the absent injury allegation, petitioner cannot claim injury done to its members as a basis for its own standing—any more than in *Tileston* v. *Ullman,* 318 U. S. 44 (1942) a medical doctor could claim standing to obtain an adjudication of his patients' constitutional right to life which they did not assert on their own behalf.

Admittedly, on a few occasions this Court has found special circumstances to justify associations asserting the rights of their members, but only when such organizations are uniquely situated to assert such rights. See, *NAACP* v. *Button,* 371 U. S. 415, 428 (1963); *NAACP* v. *Alabama,*

4. The Department of Agriculture provides detailed appeal procedures from decisions of the Forest Service. 36 C. F. R. §§ 211.20-211.119.

5. See, Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N. Y. U. L. Rev. 201 (1970).

357 U. S. 449, 458-459 (1958). However, this is not a case in which the petitioning organization's members are unable to seek protection in the courts without themselves sacrificing the very right for the protection of which suit was brought. See *NAACP* v. *Alabama, supra,* at 458-459.

Actual users of Mineral King Valley are not prevented in any way from claiming injury and filing their own complaints. If such persons have not been sufficiently interested to voice such opposition, certainly petitioner should not now be allowed standing to litigate, on the claim that it represents the interests of such silent sufferers. Petitioner has shown no needed exception to the fundamental principle that it cannot claim standing on the basis of the allegedly infringed rights of others. Cf. *Alderman* v. *U. S.*, 394 U. S. 165, 174 (1969).

Such a result is consistent also with the framework and finality of class actions procedures. A person injured by an agency decision may be an appropriate party-plaintiff in a class action under Rule 23, F. R. C. P., in which event the Rule 23 tests and requirements would apply to insure that the class is properly constituted and represented. However, such a party-plaintiff must allege an injury in fact to itself which would render it a member of the class it purports to represent. *Bailey* v. *Patterson,* 369 U. S. 31 (1961). Here, petitioner is obviously not a member of a class of persons who have suffered an injury in fact.

Adherence to the class action framework under Rule 23, F. R. C. P., rather than permitting a club to make generalized claims of representing the interests of its members, provides the *res* upon which *res judicata* can operate. Here, however, if petitioner is granted standing, but loses on the merits, there is nothing to prevent relitigation by its members. Despite petitioner's rhetoric, the rights of its members have not been tendered for adjudication. If

Sierra Club members cannot be bound by an adverse decision, petitioner should not be able to assert such rights to claim standing. See, *Alameda Conservation Association* v. *State of California,* 437 F. 2d 1087, 1097-98 (9th Cir., 1971) (concurring opinion, Merrill, *J.*).

III. A New Subjective Criteria for Standing of a Naked "Concern" for the Matters in Issue Should Not Be Substituted for the Objective Criteria of "Injury in Fact".

Unlike many other actions challenging agency action pertaining to the use of public lands, petitioner has here avoided naming as additional parties-plaintiff any persons or local groups allegedly injured by the contested agency action. That apparently deliberate omission raises a material question of whether the basis for standing to sue in the federal courts should now be changed from an allegation of objective "injury" to an allegation of subjective "concern" for the issues.

This Court has recognized that a plaintiff must have the "personal stake and interest that impart the concrete adverseness required by Article III." *Baker* v. *Carr,* 369 U. S. 186, 194 (1962); cited in *Barlow* v. *Collins, supra,* at 164 (1970) and *Flast* v. *Cohen,* 392 U. S. 83, 99 (1967). However, this Court has not been willing to allow such "concrete adverseness" to be developed solely out of motivation to litigate. Something more than an "adversary interest" is necessary to confer standing. *Jenkins* v. *McKeithen,* 395 U. S. 411, 423 (1969). As stated in *Doremus* v. *Board of Education,* 342 U. S. 429, 434, 435 (1951):

> "It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct."

Admittedly, the requisite interest need not necessarily be financial.[6] But, that interest must consist of more than mere motivation. Undoubtedly, every party who has carried to this Court the question of his standing to sue, as has petitioner, has possessed a high degree of motivation. Yet, motivation alone has not convinced this Court that such parties possessed standing to complain in the federal courts.[7] Professor Davis has observed that.[8]

> "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."
>
> * * * * *
>
> "Federal law is clear that standing may rest upon a trifle, and *it is equally clear that at least a trifling interest of the plaintiff is always required.*" (Emphasis supplied.)

This, then, is the dividing line between parties entitled to standing and those who are not: Simply, one who has no interest of his own at stake always lacks standing.[9] *Tileston* v. *Ullman, supra,* at 46 (1943).

The prerequisite to standing of injury in fact is simple, objective, and does not result in an injustice where parties are actually in danger of suffering an injury.

If, on the other hand, a sincere "concern" over the

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6. See, *Association of Data Processing Service Organizations* v. *Camp, supra,* at 154.

7. Conversely, the magnitude of the required injury in fact is of little consequence. In *Flast* v. *Cohen,* 392 U. S. 83 (1967), the actual dollars and cents injury was undoubtedly trivial, though the motivation to pursue the litigation in an adversary setting was obviously high as a result of the dispute involved under the Establishment Clause of the First Amendment.

8. See, K. Davis, *Administrative Law Treatise,* §§ 22.09-5 (1970 Supp.).

9. *Id.,* at p. 753.

issues is sufficient to justify standing, what will be the test of proper parties-plaintiff? Adoption of such a basis for standing would replace a well-grounded objective standard with a subjective one. How would a sincere "concern" be tested? How much "concern" would be required? Will two Iowa residents who have never had any personal contact with the Sierra Nevada Mountains, for example, have the same right to standing to protest agency action pertaining thereto as a national conservation organization?[10] If not, what principles should federal courts use in determining whether a plaintiff has standing to sue?

It may be argued that as long as a "public" versus a "private" issue is at stake, the requirement of injury in fact should be modified. Yet, what is a "public" versus a "private" issue? Are all questions pertaining to the use of public lands "public" questions which would permit suit by anyone alleging a sincere "concern" without more? Such obvious difficulties are avoided by adherence to the established principle that injury in fact must be alleged.

If petitioner can gain standing solely on the basis of its "concern" for conservational values, what remains of the limitations on the standing of taxpayers expressed in *Flast* v. *Cohen, supra* (1968)?[11] There, this Court condi-

10. See, Rogers, *The Alice-in-Wonderland World of Standing*, Lewis and Clark Environmental Law, March, 1971; Sussman, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 Geo. Wash. L. Rev. 570 (1971).

11. In *Alameda Conservation Association* v. *State of California, supra* (9th Cir. 1971), the court below found that individual members of a conservation organization owning property either bordering on San Francisco Bay or within six miles of the Bay had standing to sue to halt a salt company from filling the Bay, allegedly to the detriment of fish, wildlife and climate. However, that Court, consistent with its holding below here, held that the Association itself was not entitled to sue simply because of an avowed "concern" for conservation principles, i.e.

"If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could

tioned the standing of the plaintiff-taxpayers upon demonstration of a nexus, *first,* between their status as taxpayers and the type of legislative enactment attacked, and, *second,* between such status and the precise nature of the constitutional infringement alleged. 392 U. S. at 102. Without such a nexus, the plaintiff-taxpayers would be denied standing.

However, if petitioner may now achieve standing by asserting nothing more than a sincere "concern" for conservation principles, may not a taxpayer, objecting to a governmental expenditure which did not meet the *Flast* nexus test, gain standing by merely alleging a sincere "concern" to prevent the alleged unlawful or unconstitutional expenditure of funds for the specific purpose involved? If so, why did *Flast* go to such pains to emphasize the nexus requirements for standing?

IV. Petitioner's Concern for Conservation Principles Does Not, Without More, Bring It Arguably Within Any Statutorily Protected Zone of Interest.

The second test of standing,[12]—whether the complainant's interest sought to be protected is arguably within a statutorily protected "zone of interest"—also has not been satisfied by petitioner.

The Conservation Code, 16 U. S. C. § 1 et seq., was enacted to conserve the natural resources and public land of the United States. Arguably, persons injured in fact by

assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing. The point is that the standing necessary to assert as a litigant must be that of the litigant." 437 F. 2d at 1091.

12. See, *Investment Company Institute* v. *Camp, supra,* at 4407 (1971); *Association of Data Processing Service Organizations* v. *Camp, supra,* at 153 (1970).

an agency violation of that Code fall within the "zone of interest" sought to be protected. Thus, persons who allege that they have been deprived of the use of public lands as a result of allegedly unlawful agency action may satisfy the requirements of the "zone of interest" test. In addition, such persons may be granted standing under the Administrative Procedure Act (APA), as persons "aggrieved by agency action within the meaning of a relevant statute." 5 U. S. C. § 702. See, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 39 U. S. L. Week 4287 (U. S. March 2, 1971); *Barlow* v. *Collins, supra*, at 164, 165.

However, petitioner can not point to any provision of the Conservation Code, or APA, or any other relevant statutory or regulatory provision, which indicates that an organization concerned with conservation falls within the "zone of interest" sought to be protected solely because of its "concern" for conservational values. None of the relevant statutory provisions has attempted to afford standing to a complainant who has not suffered an injury in fact.[13]

Similarly, there is no relevant statutory indication that Congress has conferred upon conservation clubs such as petitioner standing as a "private attorneys general" to represent the interests of others who have been aggrieved by the administrative action. Without such a statutory expression, the petitioner should not be accorded such status. See, *Association of Data Processing Service Organizations* v. *Camp, supra*, at 153, n. 1. (1970). See also *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476-477 (1940); *Scanwell Laboratories, Inc.* v. *Schaffer*, 424 F.

13. By contrast, the National Environmental Policy Act of 1969, which is not involved here, does require all federal agencies to cooperate with concerned private organizations to further the policies of that Act. Arguably, such a provision may be an attempt to grant standing to litigate. 42 U. S. C. § 4331. See comment, *EDF* v. *Corps of Engineers*, 325 F. Supp. 728, 736 (E. D. Ark. 1971).

2d 859, 864 (D. C. Cir., 1970); *Associated Industries* [illegible] *Ickes,* 134 F. 2d 694, vacated on suggestion of moot[illegible] 320 U. S. 707 (1943).

CONCLUSION.

For the reasons set forth above, the decision of [illegible] United States Court of Appeals for the Ninth Circuit, [illegible] F. 2d 24 (9th Cir. 1970), with respect to its holding th[illegible] the petitioner has no standing as a party-plaintiff in th[illegible] action, should be affirmed.

Respectfully submitted,

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